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Of Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THOMAS HUBBARD,

Plaintiff,

vs.

PHIL'S BBQ OF POINT LOMA, INC., a
California corporation, PHILLIP C. PACE and

JEFFREY A. LOYA,

Defendants

Case No.:

COMPLAINT

Dissolution of Corporation,
Breach of Fiduciary Duty,
Contract Breach

Jury trial requested

'09 CV U 735 LAB

CAB

JURISDICTION AND VENUE

1. This action arises under California common law and under California Corporation Code §1800.

2. This Court has federal question jurisdiction pursuant the diversity of citizenship of the parties and the requisite amount in controversy pursuant to 28 USC § 1332.

3. Venue is proper in this district pursuant to 28 USC § 1391(a) & (c) because plaintiff is a citizen of the state of Oregon and all of the defendants are citizens of the state of California and are all residents of the Southern District of California.

COMPLAINT

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PAGE 1 OF 8

THE PARTIES

4. Plaintiff Thomas Hubbard is a citizen of the state of Oregon. Mr. Hubbard has been a shareholder of Phil's BBQ since shortly after the corporation's inception in 2006. Mr. Hubbard originally owned 1,850 shares of its common stock (representing about 5% of Phil's BBQ issued and outstanding stock). Mr. Hubbard obtained another 1,850 share in or about October 2007 from the shares already owned by the other 2 shareholders. Mr. Hubbard currently holds about 10% of Phil's BBQ issued and outstanding stock.

5. Defendant Phil's BBQ of Point Loma, Inc. ("Phil's BBQ") is a California corporation whose principal business office and center of business operations is in San Diego County, California. Phil's BBQ was formed on or about April 7, 2006.

6. Defendant Phillip C. Pace is a citizen of the state of California. Mr. Pace owns 16,575 shares (about 45%) of the outstanding common stock of defendant Phil's BBQ. Since its inception, Mr. Pace has been a member of Phil's BBQ board of directors and its president and secretary.

7. Defendant Jeffrey A. Loya is a citizen of the state of California. Mr. Loya owns 16,575 shares (about 45%) of the outstanding common stock of defendant Phil's BBQ. Since its inception, Mr. Loya has been a member of Phil's BBQ board of directors and its vice-president and chief financial officer.

FACTS COMMON TO ALL CLAIMS

8. At all times, there have been 3 and only 3 shareholders of Phil's BBQ: Thomas Hubbard, Phillip Pace and Jeffrey Loya.

9. The owners of Phil's BBQ have elected S corporation status under the federal tax code, that is, they have elected to treat the corporation as a partnership for tax purposes. The owners have otherwise acted as if Phil's BBQ were an incorporated partnership and acted among themselves as would partners in a partnership.

10. On or about May 26, 2007, Phil's BBQ and the 3 shareholders of Phil's BBQ each executed a Shareholder Agreement. Section 1.10(c) of this Shareholder Agreement provides: "The Shareholders agree that PACE, LOYA and HUBBARD shall be Directors of the

1 Corporation and PACE and LOYA shall be Officers of the Corporation.”

2 11. The Shareholder Agreement provided in Section 4 that no shareholder could transfer
3 or pledge his shares without first offering his shares to the other shareholders.

4 12. In breach of the promises set forth in Section 4 of the Shareholder Agreement,
5 defendant Pace pledged his shares in Phil's BBQ to Janet Desmond and Alan Yaghdjian without
6 first offer his shares to plaintiff.

7 13. Throughout the existence of Phil's BBQ, defendants Pace and Loya have
8 disregarded plaintiff's status as a director and, on information and belief, conducted director
9 meetings without notice to, or the participation by, plaintiff.

10 14. On information and belief, in or about July 2008, defendants Loya and Pace, acting
11 without the knowledge or consent of plaintiff, caused Phil's BBQ to make 2 transfers of money
12 to Pace, one in the sum of \$523,000 and the other in the sum of \$550,000, so that Pace could
13 purchase a golf course in his own name. Pace later characterized these transfers as “loans”, but if
14 loans, the terms of such loans were commercially unreasonable.

15 15. On information and belief, in or about July 2008, defendants Loya and Pace, acting
16 without the knowledge or consent of plaintiff, caused Phil's BBQ to make a transfer of money to
17 Loya in the sum of \$550,000. Loya later characterized this transfer as a “loan”, but if a loan, the
18 terms of this loan was commercially unreasonable.

19 16. On information and belief, in or about July 2008, defendants Loya and Pace, acting
20 without the knowledge or consent of plaintiff, caused Phil's BBQ to borrow the sum of
21 \$1,100,000 from Wells Fargo Bank.

22 17. On information and belief, in or about July 2008, immediately upon causing Phil's
23 BBQ to borrow said \$1,100,000 from Wells Fargo Bank, defendants Loya and Pace transferred
24 the proceeds of this Wells Fargo loan to themselves on commercially unreasonable terms.

25 18. All of such fund transfers to Pace and Loya, if loans, were consummated without the
26 approval of the Phil's BBQ shareholders or directors, as required by § 315 of the California
27 Corporation Code.

28 19. Despite demand by plaintiff, Phil's BBQ has refused to permit him to inspect the

corporation's records as required by § 1601 of the California Corporation Code.

FIRST CLAIM

(Action for Dissolution § 1800 of the California Corporation Code)

20. Plaintiff incorporate paragraphs 1 through 19 herein.

21. Throughout the existence of Phil's BBQ, Pace and Loya have been in control of the corporation.

22. Pace and Loya been guilty of or have knowingly countenanced persistent and pervasive fraud, mismanagement or abuse of authority or persistent unfairness toward any shareholders and the property of Phil's BBQ has been misapplied or wasted by reason of the following:

A. Pace and Loya have caused the corporation to make \$1,623,000 in loans to themselves, on commercially unreasonable terms, without the knowledge or consent of plaintiff and in violation of § 315 of the California Corporation Code.

B. Pace and Loya have caused the corporation to transfer the proceeds of the Wells Fargo loan to themselves.

C. Pace and Loya have been conducting the financial and other business of the corporation without the knowledge or consent of plaintiff, despite the fact that plaintiff is one of the corporation's 3 directors.

D. Pace and Loya have continuously refused plaintiff's request for inspection of corporation records in violation of § 1601 of the California Corporation Code.

E. Pace and Loya have attempted to exclude plaintiff from the benefits of stock ownership in the corporation by causing the corporation to pay over to themselves all of the corporation's profits through payments to themselves while at the same time refusing to pay consulting fees and proportional distributions to plaintiff.

23. The liquidation of Phil's BBQ is reasonably necessary for the protection of the rights or interests of plaintiff. Court should appoint a Receiver to take immediate possession of the assets and business of Phil's BBQ and provide for an orderly liquidation of that business through the sale of its restaurant and other assets as a going concern. The Court should further

1 order an accounting of the assets of the corporation improperly transferred to Pace and Loya and
 2 after that accounting, a consequent financial reconciliation in accordance therewith either from
 3 Phil's BBQ or defendants Pace and/or Loya as the case may be and the payment of all debts of
 4 the corporation (including any debts owned to plaintiff related to his Consulting Services
 5 Agreement, or otherwise), order the Receiver to plaintiff his proportionate share of the corporate
 6 assets. Plaintiff believes that the corporation has a going concern value in excess of
 7 \$10,000,000.

8 **SECOND CLAIM**

9 (Breach of fiduciary duty)

10 24. Plaintiff incorporate paragraphs 1 through 19 herein.

11 25. The owners of Phil's BBQ have elected S corporation status under the federal tax
 12 code, that is, they have elected to treat the corporation as a partnership for tax purposes. The
 13 owners have otherwise acted as if Phil's BBQ were an incorporated partnership and acted among
 14 themselves as would partners in a partnership.

15 26. As controlling shareholders of Phil's BBQ, Pace and Loya owe plaintiff a fiduciary
 16 duty.

17 27. Pace and Loya have breached their fiduciary duty to plaintiff as follows:

18 A. Pace and Loya have attempted to exclude plaintiff from the benefits of stock
 19 ownership in the corporation by causing the corporation to pay over to themselves nearly all of
 20 the corporation's profits through loans and other payments while at the same time refusing to pay
 21 consulting fees and distributions to plaintiff.

22 B. Pace and Loya have caused the corporation to make \$1,623,000 in loans to
 23 themselves, on commercially unreasonable terms, without the knowledge or consent of plaintiff
 24 and in violation of § 315 of the California Corporation Code.

25 C. Pace and Loya have caused the corporation to transfer the proceeds of the Wells
 26 Fargo loan to themselves.

27 D. Pace and Loya have been conducting their business of the corporation without the
 28 knowledge or consent of plaintiff, despite the fact that plaintiff is one of the corporation's 3

1 directors.

2 28. As a direct and proximate result of the aforementioned breach of fiduciary duty,
3 plaintiff has been damaged in that his shares in Phil's BBQ have been substantially reduced in
4 value damaging plaintiff in a sum to be determined at trial, but not less than \$1,000,000.

5 **THIRD CLAIM**

6 (Breach of Contract)

7 29. Plaintiff incorporate paragraphs 1 through 19 herein.

8 30. Prior to June 2006, plaintiff was in control of a corporation which owned a lease on
9 the real property that eventually became the site of the Phil's BBQ operations.

10 31. Pace and Loya wanted to have this lease transferred to Phil's BBQ.

11 32. As part of the consideration for the transfer of this lease, on or about June 1, 2006,
12 plaintiff and Phil's BBQ entered into a Consulting Services Agreement, wherein plaintiff
13 promised to provide restaurant consulting services as needed or not needed and Phil's BBQ
14 promised to pay plaintiff the sum of \$3,333.33 per month for 60 months, regardless of whether
15 Phil's BBQ needed plaintiff's services.

16 33. Plaintiff provided the consulting services as agreed in the Consulting Services
17 Agreement.

18 34. On information and belief, the business of Phil's BBQ was successful, largely as a
19 result of the knowledge and skill of plaintiff.

20 35. On or about June 1, 2007, Phil's BBQ wanted to increase the participation of
21 plaintiff in the business, particularly his on-site services to the business. Since plaintiff lived in
22 another state, this required plaintiff to frequently travel to San Diego, and ultimately to lease an
23 apartment in San Diego, and to spend considerably more time working on behalf of Phil's BBQ
24 than the parties originally contemplated. In order to obtained plaintiff's agreement to the
25 expansion of his duties, Phil's BBQ agreed to increase the monthly pay to plaintiff under the
26 Consulting Services Agreement to \$8,333.33 per month for the remaining months on the
27 Consulting Services Agreement. All other terms of the Consulting Services Agreement
28 remained unchanged.

36. Plaintiff has continued to provide consulting services to Phil's BBQ as promised.

37. Phil's BBQ paid plaintiff the sum of \$3,333.33 per month for the first 11 months of the Consulting Services Agreement, as promised. Once the monthly rate increased, Phil's BBQ paid plaintiff the sum of \$8,333.33 for an additional 19 months, through November 2008, when such payments stopped.

38. Despite demand by plaintiff and despite the fact that plaintiff has performed, and continues to perform, under the terms of the Consulting Services Agreement, as amended, Phil's BBQ has made no payments to plaintiff since payment was made in early December 2008 for work performed in the month of November 2008.

39. There are 30 payments of \$8,333.33 remaining due on the Consulting Services Agreement, for a total of \$250,000.

40. Section 11(e) of the Consulting Services Agreement provides that the prevailing party on any dispute under the Consulting Services Agreement be entitled to an award of that parties reasonable attorney fees and cost, including the costs and fees of expert witnesses and/or consultants.

WHEREFOR, plaintiff prays for judgment against the defendants as follows:

FIRST CLAIM: For the Court to order:

(A) the dissolution of defendant Phil's BBQ;

(B) the appointment of a Receiver to take immediate possession of the assets and business of Phil's BBQ and provide for an orderly liquidation of that business through the sale of its restaurant and other assets as a going concern;

(C) an accounting of the assets of the corporation improperly transferred to Pace and Loya; and

(D) after that accounting and the payment of all debts of the corporation (including any debts owed to plaintiff related to his Consulting Services Agreement, or otherwise), the Receiver to plaintiff his proportionate share of the corporate assets.

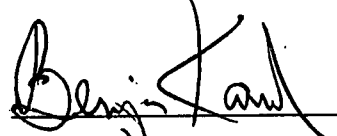
SECOND CLAIM: For a judgment against defendants Pace and Loya, jointly and severally, in an amount to be determined at trial, but not less than the sum of \$1,000,000.

1 THIRD CLAIM: For a judgment against defendant Phil's BBQ in a sum equal to
2 \$250,000, plus plaintiff's reasonable attorney fees and costs, including expert witness and/or
3 consultants.

4 Plaintiff also prays for such other relief as the Court deems just and equitable and for his
5 costs incurred herein.

6 Dated this 7th day of April, 2009.

7 Respectfully submitted:

8 
9

10 Benjamin H. Kaminash,

11 Of attorneys for plaintiff Thomas Hubbard
12

13 **VERIFICATION (C.C.P. 446)**

14 I have read the foregoing Complaint for Dissolution of Corporation, Breach of Fiduciary Duty, &
15 Contract Breach and know its contents.

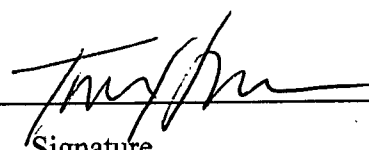
16 ☐ I am a party to this action. The matters stated in the foregoing document are true of my own
17 knowledge, except as to those matters which are stated on information and belief, and as to those
18 matters, I believe them to be true.

19 Executed on (date) 4-9-09, at San Diego, California.

20 I declare under penalty of perjury under the laws of the State of California that the foregoing is
21 true and correct.

22
23 TOM HUBBARD

24 Type or Print Name

25 
26 Signature
27
28

JS 44 (Rev. 12/07)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

Thomas Hubbard

DEFENDANTS

Phil's BBQ of Point Loma, Phillip C. Pace and Jeffrey A. Loya

County of Residence of First Listed Plaintiff Jackson County, OR
(EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant San Diego County, CA
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED BY _____

Attorneys (If Known)

L. Scott Keen

09 CV 0735 LAB

BLM

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

☐ 1 U.S. Government Plaintiff ☐ 3 Federal Question (U.S. Government Not a Party)

☐ 2 U.S. Government Defendant ☒ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Citizen of This State ☒ 1 ☒ 1 Incorporated or Principal Place of Business In This State ☐ 4 ☐ 4

Citizen of Another State ☒ 2 ☒ 2 Incorporated and Principal Place of Business In Another State ☐ 5 ☐ 5

Citizen or Subject of a Foreign Country ☐ 3 ☐ 3 Foreign Nation ☐ 6 ☐ 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input checked="" type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input type="checkbox"/> 440 Other Civil Rights	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN

(Place an "X" in One Box Only)

☒ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Remanded from Appellate Court ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district (specify) ☐ 6 Multidistrict Litigation ☐ 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
28 USC 1332

Brief description of cause:

Dissolution of corporation, breach of fiduciary duty and contract breach.

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$

CHECK YES only if demanded in complaint:

JURY DEMAND: ☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

DATE

04-09-2009

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT #

161937

AMOUNT

350.

APPLYING IFP

JUDGE

MAG. JUDGE

4/10/09

Attachment to Civil Cover Sheet form JS 44

1. (c)

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**UNITED STATES
DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION**

161937 - SR

**April 10, 2009
14:32:48**

Civ Fil Non-Pris

USAO #: 09CV0735

Judge.: LARRY A BURNS

Amount.:

\$350.00 CK

Check#: PC#1623

Total-> \$350.00

**FROM: HUBBARD V. PHIL'S BARBEQUE
CIVIL FILING**